In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. a. In its original decision in *Tiidee I*[1], the Board found that the Company, in resisting the organizational drive of the International Union of

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[1]Two Board decisions, hereafter *Tiidee I* and *Tiidee II*, were consolidated for purposes of review in the court of appeals.

Electrical, Radio and Machine Workers, AFL-CIO, at its Dayton, Ohio, plant, violated Section 8(a)(1) and (3) of the National Labor Relations Act by interrogating employees about their union activities, by raising production quotas, and by discharging and laying off certain employees because of their support for the Union. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had been certified by the Board as the representative of its employees following a Board-conducted election, and by refusing to supply the Union with requested information necessary for it to bargain intelligently (Pet. App. 34-35).[2] The Board ordered the Company, *inter alia,* to cease and desist from the unfair labor practices found, to reinstate the discharged employees, and to bargain with the Union (Pet. App. 38-44). The Board declined the Union's request for broader remedial relief (Pet. App. 37-38, 45-46).[3] The court of appeals enforced the Board's order, but remanded the case to the Board for further consideration of the Union's request for additional relief (Pet. App. 110-131).

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[2]"Pet. App." refers to the appendix to the petition in No. 73-1180.

[3]The Union requested, *inter alia,* that the Company make the employees whole for wages and other benefits which they might have received but for the Company's unlawful refusal to bargain, and pay the Union the amount of dues and initiation fees it lost as a result of that refusal.

b. On the remand, the Board granted some of the additional relief requested by the Union, including the requirement that the Company reimburse the Board and the Union for litigation expenses, including attorneys' fees (Pet. App. 90-92). The Board noted that, in *Heck's, Inc.*, 191 NLRB 886, 889,[4] it had ruled that normally litigation expenses are not recoverable in a Board proceeding. It concluded that a departure from this rule was warranted in the case of "frivolous litigation such as this is", since the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (Pet. App. 90-91).

The Board denied the Union's request to make the employees whole for monetary losses suffered as a result of the Company's unlawful refusal to bargain (the "make-whole" remedy). Accepting as the "law of the case" the view of the court of appeals that the Board has authority to grant such remedy (Pet. App. 85), the Board concluded that it would not be "practicable" to do so in light of "the record herein." The Board found that the record provided "no way by which the Board could ascertain with even approximate accuracy * * * what the parties '*would* have agreed to' if they had bargained in good faith." (Pet. App. 87, emphasis in original.) The Board added that it would "further delay the commencement of meaningful collective bargaining" to remand the case to a Trial Examiner for a hearing to devise a " 'make-whole' formula for backpay to be awarded employees, if any." For, the Company, "which is under order to bargain with the Union, is not likely to

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[4]This case is before the Court in *National Labor Relations Board v. Food Store Employees Union, Local* 347, No. 73-370.

agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain" (Pet. App. 87-88).

Thereafter, in *Tiidee II,* which involves further unfair labor practices committed by the Company after the events covered in *Tiidee I,* the Board followed the same course. It awarded litigation expenses, but declined the Union's request for a make-whole remedy (Pet. App. 101-102).

c. Petitions to review the Board's supplemental orders in *Tiidee I* and *II* were filed in the court of appeals by both the Company and the Union, and the Board filed a cross-petition for enforcement of those orders. The Company contested the orders on the ground, *inter alia,* that the Board lacks statutory authority to award litigation expenses even in frivolous cases. The Union challenged the Board's action in refusing to provide the make-whole and other remedies which it requested. The court of appeals heard argument in the cases on September 24, 1973, and they are awaiting its decision.

2. In No. 73-1180, the Company, in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals—*i.e.,* whether Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board to order a respondent to reimburse the Board and the charging party for expenses incurred in the investigation, preparation, and conduct of an unfair labor practice case (Pet. 3).[5] In No. 73-1423, the Union, like-

[5]The Company also seeks to present the further question whether, assuming the existence of such power, the Board was reasonable in awarding litigation expenses subsequent to the date when the Company offered to comply with its obligations under the Act (Pet. 3).

wise in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals— *i.e.*, whether the Board has power to make the employees whole for losses suffered as a result of an unlawful refusal to bargain with their union representative (Pet. 3).[6]

The issues presented by the petitions are not "* * * of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court" prior to judgment in the court of appeals. Rule 20 of the Rules of this Court.[7] The question the Company raises—whether the Board has power to award litigation expenses—was not raised by either the Board or the Union in this Court in *National Labor Relations Board* v. *Food Store Employees Union, Local 347,* No. 73-370, argued March 18-19, 1974, and therefore is not properly before the Court in that case. See the Board's supplemental brief in that case, pp. 1-5. Moreover, *Tiidee I* and *II* were argued in the court of appeals on September 24, 1973 and that court may be holding its decision pending this Court's decision in *Food Store*

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[6]The Union also seeks to present these further questions: (1) whether, assuming that the Board has power to provide a make-whole remedy, it abused its discretion in failing to order it here; (2) whether it erred in failing to reimburse the Union for the initiation fees and dues which it could have collected upon the signing of an agreement by the Company; and (3) whether the Board erred in failing to reimburse the Union for excess organizational expenses (Pet. 3-4).

[7]The power of this Court to review determinations of administrative agencies before judgment in the court of appeals has never been definitively settled. See Stern and Gressman, *Supreme Court Practice,* pp. 28-30 (4th ed. 1969). Although we believe it has that power, for the reasons given in the text this would not be an appropriate occasion to exercise it.

Employees. Although the issue of Board power is not presented therein, this Court's opinion in *Food Store Employees* may nonetheless provide some guidance to the court of appeals on that issue, and that court should be afforded an opportunity to consider the *Tiidee* cases in light of this Court's opinion.

The Union, agreeing that the issue presented by the Company should be reviewed by this Court, has filed a petition asking this Court to review "the whole issue of power to remedy a frivolously based refusal to bargain" (Pet. 17), including the Board's power to grant a "make-whole" remedy. As indicated above, review of the issue presented by the Company is not warranted. Moreover, the general issue stated by the Union's petition is not presented in these cases. The court of appeals assumed that the Board had the power to grant the remedies requested by the Union, and left it to the Board to decide which were appropriate (Pet. App. 124-125); the sole question before that court is whether the Board's order on remand complies with the court's earlier decision. That is an issue on which it is particularly appropriate that the court of appeals speak first, and indeed one which, ordinarily, this Court would not review.

In short, neither the petition of the Company nor that of the Union warrants by-passing the normal appellate procedure of court of appeals review of agency determinations.

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.